Supreme Court, U.S.
FILED
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No. 96-1143

In The

Supreme Court of the United States

October Term, 1996

LEAMINDA COKER,

Petitioner,

v.

JAMES P. DOUGLAS, A.A. COOK, RAY WILLIAMS, GEORGE E. SUMROW, CLIFFORD HENDERSON. CHARLES MELTON, Individually and as Trustees of the IBEW PENSION TRUST FUND LOCAL 716, and IBEW PENSION TRUST FUND LOCAL 716, and the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 716,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals
For The Fourth Judicial District
Bexar County, Texas

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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STATEMENT

Respondents argue that petitioner, ("Coker"), failed to raise her standing argument in the courts below, Brief in Opposition, (pp. 4-5). Such argument is unavailing as shown below. Respondents essentially argue that Coker cannot now challenge the federal court's subject matter jurisdiction over her claims. Such contention is contrary to [fundamental] established law.

Coker repeatedly argued in the trial court and on appeal that her claims were founded solely in state law *and were not the type of claims to which ERISA applied. See cf.* Rec. Vol. I, p. 3; and the appendix to Coker's petition. (Pet. App. 57a-59a [Remand Order of Federal Court; Pet. App. 23a-27a, 30a, 32a-39a]).

Respondents argued that Coker's claims came under federal court jurisdiction; therefore, respondents had the burden to establish such contention as a matter of law. Moreover, under Texas law, respondents, as movants for summary judgment on the affirmative defense of ERISA preemption, had the burden to establish every element of that affirmative defense as a matter of law. Thus respondents had the burden to demonstrate that the Act applied to Coker and her claims, [including § 1132 of the Act]. Absent such proof by respondents, petitioner, as nonmovant, had no burden to present evidence that her claims *were not* enforceable under ERISA, although she consistently maintained that ERISA was not applicable to her case. Respondents' Brief in Opposition consists substantially of complaints that petitioner failed to establish her *lack of standing* under ERISA in opposing dismissal of her claims. Coker's complaint, on its face, established that neither petitioner, nor her claims, fell within the

scope of § 1132; a federal judge concluded as much in remanding Coker's case to the State court after removal by respondents; *see* Remand Order. (Pet. App. 57a-59a). Significantly, the court of appeals, in its opinion, noted that *"[petitioner] made no claim under ERISA."* (Pet. App. 3a) [emphasis supplied].

Respondents incorrectly state in their Brief in Opposition, (p. 7, n. 4), that the facts of *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993), are "materially indistinguishable from those in this case." Significantly, the plaintiff's claim in *Hashimoto* was actually recharacterized by the court as an ERISA claim under § 1140 of the Act; therefore, such contention by respondents is clearly incorrect on a controlling fact. Respondents continue to assert that petitioner's claims are within the scope of the Act, however, respondents have never demonstrated in what manner Coker, or her claims, come within § 1132 of the Act. Respondents, and the courts below, simply applied § 1144 (ERISA's preemption) clause in a vacuum, without addressing Coker's arguments that she had no claims enforceable under the Act (Pet. App. 6a-11a).

The cases relied upon by Coker, primarily *Curtis v. Nevada Bonding Corp.*, 53 F.3d 1023, 1026-1027, hold that standing to sue under ERISA is both a prerequisite to ERISA preemption and federal subject matter jurisdiction. The opinion of the Texas court of appeals to the contrary in this case conflicts with the Act, as well as with circuit precedent. The manner in which the state court has applied the Act to this case presents an important question of federal law which significantly impacts upon ERISA and raises significant issues relating to the power of a state court to "create" federal subject matter

jurisdiction by applying the Act's preemption clause without regard to the requirements of § 1132.

ARGUMENT

I.

RESPONDENTS' ARGUMENT THAT PETITIONER WAIVED THE RIGHT TO CHALLENGE FEDERAL COURT SUBJECT MATTER JURISDICTION IS CONTRARY TO ESTABLISHED LAW

Respondents claim that petitioner did not raise her standing argument in the courts below and therefore cannot do so at this time. The right to challenge the federal court's lack of subject matter jurisdiction in this case cannot be waived. *Elliott v. Tilton*, 62 F.3d 725, 727, n. 1. Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. *Elliot* at p. 727, citing *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541. In addition, it is presumed that a cause lies outside the limited jurisdiction authorized by Constitution and statute "and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Elliot* at 727, [citations omitted]. The basis of federal court jurisdiction cannot be established "argumentatively or by mere inference," *Elliott* at p. 729. Moreover, the cases are legion holding that a party may not waive a defect in subject-matter jurisdiction, or

invoke federal jurisdiction simply by consent. *Pennsylvania v. Union Gas Company,* 491 U.S 1, 109 S.Ct. 2273, 2288 (1989); *citing, Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 377, n. 21, 98 S.Ct. 2396, 2404, n. 21 (1978); *Sosna v. Iowa,* 419 U.S. 393, 398, 95 S.Ct. 553, 556 (1975); *California v. La Rue,* 409 U.S. 109, 112, n. 3, 93 S.Ct. 390, 393, n. 3 (1972); *American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 71 S.Ct. 534 (1951).

Moreover, "there is a strong presumption against federal preemption of state law and the burden of proof is on the party asserting such," *citing Silkwood v. Kerr McGee Corp.* 464 U.S. 238, 255, 104 S.Ct. 615, 625 (1984). Respondents failed to meet such burden of proof.

Standing is generally determined from the facts plead by the plaintiff. *See Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99 S.Ct. 1601, 1613 (1979), *citing Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. at 2206. Moreover, in *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 107 S.Ct. 1542 (1987) this Court holds that ERISA preemption can form the basis for removal jurisdiction notwithstanding the well pleaded complaint rule. (*See* arguments in Coker's Petition at p. 18). ERISA preemption was raised by respondents in the federal court removal proceedings, and was rejected by that court. (Pet. App. 60a-64a; *see* Remand Order, Pet. App. 57a-59a [where the court finds that Coker's "cause of action" does not arise under federal law and her claim "as a whole" is in essence one under state law]).

II.

IN ASSERTING THE AFFIRMATIVE DEFENSE OF ERISA PREEMPTION, RESPONDENTS HAD THE BURDEN TO ESTABLISH AS A MATTER OF LAW THAT THE STATUTE APPLIED TO PETITIONER'S CLAIMS

Despite respondents' contrary allegations in their Brief in Opposition, Coker filed a response opposing summary judgment in the trial court and argued that respondents' "preemption defense" was jurisdictional. (Rec. Vol. II, p. 454.) In briefs supporting their Motion for Summary Judgment, respondents argued that "ERISA's enforcement scheme provides causes of action analogous to the Plaintiff's claims, and Plaintiff's claims are impliedly preempted," *citing* this Court's decision in *Ingersoll Rand v. McClendon*, 498 U.S. 133, 111 S.Ct. 478 (1990). However, the plaintiff's claim in *Ingersoll Rand* was characterized by this Court as a claim for benefits under an ERISA plan. Thus, the plaintiff's claims in that case differed significantly from Coker's claim; moreover, in *Ingersoll Rand* the plaintiff qualified as a "participant" and a "beneficiary" within the scope of § 1132. Therefore, respondents statement that Coker's claims were "impliedly preempted" under this Court's decision in *Ingersoll Rand* is an obvious misapplication of that case.

Respondents do not dispute that Coker has never asserted a claim for benefits under the [ERISA] Plan. Respondents even argued to the trial court, [in requesting the state court to dismiss petitioner's case], that although ERISA permits state courts to exercise concurrent jurisdiction on a limited number of claims, [citing 29 U.S.C.

§ 1132 (e)(1); *i.e.*, claims for benefits under a Plan], petitioner's claims *did not* fall into [this category], and therefore [petitioner's claims] "lie in the exclusive jurisdiction of the federal court . . . " (Rec. Vol. II, p. 466). However, respondents did not attempt to demonstrate in what manner Coker's claims "lie in the exclusive jurisdiction of the federal courts," under § 1132.

Significantly, respondents conceded in their briefs to the trial court that a state law claim asserting that an employee, even an administrator, who was fired because of race, sex, age, etc., did not "relate to" a plan and therefore was not preempted. (Rec. Vol. IV, p. 1023), citing *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97 n. 17 (1983) and *Lane v. Goren*, 743 F.2d 1337, 1339-40 (9th Cir. 1984). Thus, respondents legal analogies and arguments to the trial court were premised on an incorrect legal theory which was adopted by the trial court and the court of appeals, *e.g.*, that Coker's case was preempted by ERISA *solely* because her claims "related to" an ERISA plan, thereby triggering ERISA's preemption clause. The action of the courts below is contrary to Congressional mandate with respect to the parties entitled to bring an action under ERISA and the types of actions which may be asserted under the Act, as set forth in § 1132. The state courts in Coker's case in effect "created" federal subject matter jurisdiction over Cocker's claims *solely* by finding that her claims "relate to" an ERISA plan and came within the broad preemptive scope of § 1144 of ERISA. Thus, it is obvious from the record below that the courts analyzed the claims solely under § 1144 of the Act without regard to the status of Coker or her claims under § 1132.

To support respondents' incorrect legal theory, and resulting misapplication of § 1144 by the courts below,

respondents state in briefs to the trial court that they "have not contended that Plaintiff's breach of contract claim is preempted, precisely because it does not 'relate to' the Plan . . . ," (Rec. Vol. IV, p. 1024). Thus, respondents argued in the state courts that a case is preempted solely on the grounds that it meets the "relates to" test of § 1144. Despite Respondents' concession last above quoted, the trial court nonetheless dismissed all of Coker's claims on the grounds of complete ERISA preemption. (Pet. App. 14a-17a).

In opposing summary judgment, Coker argued that "[D]efendants continue to ignore and fail to address the controlling caselaw holding that a state court tort action brought against a pension plan . . . in its capacity as an employer is not preempted." (Rec. Vol. 4, p. 1032).

In Coker's Motion for New Trial in the trial court, she argued that "ERISA has no applicability to a suit against a pension plan as an employer in connection with matters concerning the relationship of employer and employee . . . ," and that summary judgment was improper in her case because her case *was not the type of case* "to which ERISA preemption applies." (Rec. Vol. I, p. 3). (Emphasis supplied). The record is replete with petitioner's arguments that her case is not the type of case contemplated in ERISA's regulatory scheme and therefore was not subject to preemption. Respondents' statements to this Court that petitioner is raising this issue for the first time are patently false.

Federal preemption is an affirmative defense. *See Gorman v. Life Ins. Co. of North America,* 811 S.W.2d 542, 546 (Tex. 1991), *cert. denied,* 502 U.S. 824, 112 S.Ct. 88

(1991) (preemption under Employee Retirement Income Security Act (ERISA)); *see also City of Houston v. First City,* 827 S.W.2d 462, 467-68 (Tex.App.– Houston [1st Dist.] 1992, writ denied) (preemption under federal banking laws pleaded as affirmative defense); *Dueringer v. General American Life Ins. Co.,* 842 F.2d 127, 129-30 (5th Cir. 1988) (ERISA preemption). When a defendant moves for summary judgment based on an affirmative defense, the defendant has the burden to prove conclusively all the elements of the affirmative defense as a matter of law. *Montgomery v. Kennedy,* 669 S.W.2d 309, 310-311 (Tex. 1984). Unless the movant conclusively establishes the affirmative defense, the non-movant has no burden in response to a defendant's motion for summary judgment filed on the basis of an affirmative defense. *Torres v. Western Casualty & Sur. Co.,* 457 S.W.2d 50, 52 (Tex. 1970).

Respondents' reliance on *Hashimoto v. Bank of Hawaii,* 999 F.2d 408 (9th Cir. 1993) is misplaced. The plaintiff in *Hashimoto* filed a claim which falls squarely within § 1132 of ERISA; moreover, the claim involved a state ["whistleblower"] statute which proscribed virtually identical conduct proscribed by § 1140 of ERISA. Standing under § 1132 was not an issue in *Hashimoto;* in fact, in that case, the Court held that "Hashimoto's complaint should be recharacterized as an ERISA claim under 29 U.S.C. § 1140." Moreover, the court in *Hashimoto* acknowledged that "[S]tate law can, however, apply to transactions between plans and . . . *their own employees, because these relationships are outside ERISA's purview,* citing *General Am. Life Ins. Co. v. Castonguay,* 984 F.2d 1518, 1522 (9th Cir. 1993). [emphasis supplied].

Coker's claims cannot be "recharacterized" as ERISA claims under any section of the Act. Under the Ninth

Circuit holdings in *Curtis v. Nevada Bonding Corporation*, 53 F.3d 1023 (9th Cir. 1995) and *Harris v. Provident Life and Accident Insurance Co.*, 26 F.3d 930 (9th Cir. 1994), Coker's case is not subject to preemption because her claims do not meet any criteria set forth in § 1132 of ERISA. Neither respondents, nor the courts below, attempted to recharacterize Coker's claims as claims that come within § 1132. Unless Coker and her claims come within the scope of § 1132, a preemption analysis has no applicability to her case.

Logically, if respondents could demonstrate that § 1132 of ERISA applies to Coker's claims, they certainly would have done so in order to establish that the Act applies to this case. In responding to Coker's analysis of § 1132's requirements in her Application for Writ of Error to the Texas Supreme Court, respondents simply ignored the issue and made no attempt to demonstrate how Coker and her claims came within that section of the Act.

The Courts below misapplied § 1144 of ERISA. Without standing to sue under § 1132, § 1144 is not applicable. The "relates to" analysis of the court of appeals in Coker's case ignores the requirements of § 1132 in finding preemption under § 1144 of ERISA. Respondents' failure to prove as a matter of law that Coker's claims were enforceable under § 1132 is fatal to their affirmative defense of ERISA preemption. Petitioner's complaint, on its face, established that her claims do not come within § 1132 of ERISA. Dismissal of Coker's case by the state courts constitutes a violation of her constitutional right to due process of law and equal access to the court. The holding of the court of appeals also violates the principles set forth in *Curtis v. Nevada Bonding, supra*, and in effect

"creates" federal subject matter jurisdiction where none exists.

CONCLUSION

The state courts' failure to correctly apply ERISA preemption to only those actions and persons specified in § 1132 demonstrates the need for plenary review of this case. It is likely that state courts have, and will, continue to find ERISA preemption of cases, [usually in the context of summary dismissal], without regard to the requirements of § 1132. Due to the ever expanding scope of § 1144 preemption, a real danger exists that the federal system will be needlessly burdened with cases such as Coker's.

The courts should be required to first focus on the requirements of § 1132 before applying ERISA's preemption clause. This case illustrates the need for guidance on this issue and thus presents an important question of federal law. This Court should provide such guidance in order to avoid the continued burden imposed on the federal system with claims which Congress never intended to include in ERISA's regulatory scheme.

Respectfully submitted,

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March 1997